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No.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

NEW CASTLE AREA TRANSIT AUTHORITY,
Petitioner,

v.

ROBERT M. KRAMER, LUTHER A. MILLER, DONALD PETTITT, HOWARD N. BARNES, DAVID R. SHAW, GERALD J. MAGGIE, ERNEST ORELLI, PHILLIPS C. REED, JAMES W. BURNS, G. MAXINE PARDICK, MARTHA E. KEITH, JAMES L. RAMSEY, CLYDE W. REED, RALPH L. JONES, PHILLIPS W. REED, JOHN P. CARSON, ROBERT C. BRUNSWICK, DAVID C. MATTHEWS, WALTER R. SLACK, WILLIAM L. HANNA, LOUIS V. PAGLIARO, and all other plaintiffs similarly situated,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether the tenth amendment forbids Congress from imposing, through the commerce clause, upon a mass transit municipal authority the requirement that it pay overtime compensation to its bus drivers in accordance with the Fair Labor Standards Act?

PARTIES

In addition to those parties listed in the caption of the case,[1] the parties making *Amicus Curiae* appearances in the proceedings before the United States Court of Appeals for the Third Circuit are:

(1) United States of America, Department of Labor; and

(2) American Public Transit Association.

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[1] Robert M. Kramer, et al., Plaintiffs-Appellants, v. New Castle Area Transit Authority, Defendant-Appellee.

The petitioner, New Castle Area Transit Authority, is a municipal corporate authority. It is not a subsidiary or affiliate of any other publicly owned corporation whatsoever.

28 U.S.C. § 2403(a) may be applicable to this case. Pursuant to Supreme Court Rule 28.4(b), the Solicitor General is therefore being served. No other court of the United States has certified this fact to the Attorney General.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JURISDICTIONAL STATEMENT

On April 30, 1982, the United States Court of Appeals for the Third Circiut entered judgment against New Castle Area Transit Authority, reversing the judgment of the United States District Court for the Western District of Pennsylvania. The opinion of the Court of Appeals is reported at 677 F.2d 308 (1982).

On May 25, 1982, the United States Court of Appeals for the Third Circuit denied Petitioner's petition for rehearing.

Jurisdiction to review this judgment by writ of certiorari is conferred upon this Court by 28 U.S.C. 1254:

> "Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment. . . ."

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 8, Clause 3:

> [The Congress shall have the Power] to regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

The Tenth Amendment:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent portions of the Fair Labor Standards Act (FLSA), 29 U.S.C. 201, et seq., and the regulations promulgated thereunder 29 C.F.R. 775.3(b) are set forth in the Appendix at pages 15a to 16a.

STATEMENT OF THE CASE

The FLSA, as originally enacted in 1938, prescribed minimum wage and overtime compensation requirements for employees engaged in commerce or in the production of goods for commerce. However, that Act excluded from its provisions employees of states or their political subdivisions.

In 1958, the defendant, New Castle Area Transit Authority (Transit Authority), was officially created as a municipal authority under Pennsylvania law, pursuant to the *Municipality Authorities Act of 1945*, 1945, May 2, P.C. 382, 53 P.S. 301, et seq.[2] and thereafter began providing mass transit as a municipal service.

In 1974, Congress amended the FLSA, extending its minimum wage and maximum hour provisions to virtually all of the employees of the states and their political subdivisions. Numerous states, individual cities, the National League of Cities, and the National Governors' Conference challenged these amendments in *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976). In *National League*, the Court held with respect to the wage and hour provisions of the FLSA that, to the extent that they "operate to directly displace the State's freedom to structure *integral* operations in areas of traditional governmental functions, they are not within the authority granted by 'the Commerce Clause', Art. I., § 8, Cl. 3." *Id.* at 852. While the Court did not attempt to identify each activity within the area of traditional operations of state and local governments, *id.* at 851, n. 16, it did specifically cite as examples, fire prevention, police protection, sanitation, public health, parks and recreation, *id.* at 851, and schools and hospitals. *Id.* at 855.[3]

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[2] Authorities created under this Act are independent agencies of the Commonwealth and a part of its sovereignty. *Commonwealth* v. *Erie Metropolitan Transit Authority*, 444 Pa. 345, 281 A.2d 882 (1971).

[3] In recognizing that schools and hospitals provide "an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens," 426

On remand, the three-judge court recognized that the decision left a certain "gray area" for future resolution and expressed concern over the eventual resolution of this area. *National League of Cities* v. *Marshall*, 429 F. Supp. 703 (D.D.C. 1977). In response, on December 21, 1979, the Department of Labor issued a final interpretative ruling listing non-traditional governmental functions, 29 C.F.R. § 775.3. Included in that list were local mass transit systems.[4]

On July 17, 1980, plaintiffs instituted the present action seeking declaratory relief and damages, including back wages, liquidated damages and attorneys fees. Jurisdiction of the United States District Court for the Western District of Pennsylvania was based on 28 U.S.C. § 1337 and 29 U.S.C. § 216(b). On June 11, 1981, the District Court entered summary judgment for the defendant based on a finding that the Transit Authority was engaged in a traditional governmental function and was therefore excluded from the coverage of the FLSA under

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U.S. at 855, the Court specifically overruled *Maryland* v. *Wirtz*, 392 U.S. 183, 88 S.Ct. 2017, 20 L.Ed.2d 1020 (1968), which had held constitutional the extension of the FLSA provisions to those areas.

[4] Other functions of states and their political subdivisions determined to be non-traditional by the same ruling are: (1) alcoholic beverage stores; (2) off-track betting corporations; (3) generation and distribution of electric power; (4) provision of residential and commercial telephone and telegraphic communications; (5) production and sale of organic fertilizer as a by-product of sewage processing; (6) production, cultivation, growing for harvesting of agricultural commodities for sale to consumers; and (7) the repair and maintenance of boats and marine engines for the general public. 29 C.F.R. § 775.3(b).

National League. A copy of the Order of the District Court is contained in the Appendix to this Petition.

Plaintiffs timely filed an appeal to the United States Court of Appeals for the Third Circuit. On April 30, 1982, that Court reversed the decision of the District Court, holding that providing mass transportation to the public was not traditionally a government function. A copy of the Opinion and Order of the Court of Appeals is contained in the Appendix to this Petition. (This decision is reported at 677 F.2d 308 (1982).) On May 25, 1982, the United States Court of Appeals for the Third Circuit denied the Transit Authority's Petition for Rehearing. A copy of this Order is contained in the Appendix to this Petition.

ARGUMENT

I. The Decision Of The Court Of Appeals Conflicts With Other Applicable Decisions Of This Court.

This Court has, in *National League of Cities* v. *Usury*, 426 U.S. 833, 49 L.Ed.2d 245, 96 S.Ct. 2465 (1976), (*National League*), addressed the propriety of the application of the provisions of the *Fair Labor Standards Act of 1938*, (FLSA), 29 U.S.C. §§ 201-219, to employees of the States and their political subdivisions. In *National League*, the Court addressed the issue as follows:

> One undoubted attribute of state sovereignty is the States' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work, and what compensation will be provided where these employees may be called upon to work overtime. The question we must resolve here, then, is whether these determinations are 'functions essential to separate and independent existence,' (Citation omitted.) so that Congress may not abro-

> gate the States' otherwise plenary authority to make them. *Id.* at 845 & 846.

The Court decided this issue by holding:

> We hold that insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I, § 8, cl. 3. *Id.* at 852.

Thus, *National League* clearly establishes that Congress may not, through the mere exercise of the power vested in it by the Commerce Clause, impose upon the states and their political subdivisions, the requirements that they pay their employees engaged in traditional governmental functions overtime compensation as mandated by the FLSA.

This holding was explained in *Hodel* v. *Virginia Surface Mining and Reclamation Association*, 101 S.Ct. 2352 (1981). There the Supreme Court held that congressional commerce power legislation is not invalid under the reasoning of *National League* unless three requirements are met:

(1) the challenged statute regulates the states as states;

(2) the federal regulation addresses matters that are indisputably "attributes of state sovereignty";

(3) it is apparent that the states' compliance with the federal law would directly impair their ability to structure integral operations in areas of traditional functions. *Id.* at 2366.[5]

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[5] The Court further stated, however, that a Tenth Amendment challenge is not guaranteed to succeed even if the three requirements are met because a balancing approach may be applicable. *Id.* at 2366.

In determining whether the same FLSA amendments are unconstitutional when applied to the Transit Authority under the *Hodel* test, it clearly appears that the first requirement is satisfied, i.e., the challenged statute regulates states as states, because the holding in *National League* applies to local government units. Moreover, the Transit Authority is an independent agency of the Commonwealth of Pennsylvania and a part of its sovereignty. *Commonwealth* v. *Erie Metropolitan Transit Authority*, supra.

The second requirement, that the federal regulation addresses matters that are indisputably "attributes of state sovereignty," is also satisfied. Referring to *National League*, the Court in *Hodel* held as follows:

> The Court noted, however, that "the States stand on quite a different footing from an individual or corporation when challenging the exercise of Congress' power to regulate commerce." (Citation omitted.) It indicated that when Congress attempts to directly regulate the States as States, the Tenth Amendment requires recognition "that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner." (Citations omitted.) The Court held that the *power to set the wages and work hours of state employees was "an undoubted attribute of state sovereignty."* (Emphasis added. Citations omitted.) *Id.* at 2365.

That part of the third requirement, namely, that the States' compliance with the federal law would directly

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However, the balancing approach is not applicable under the circumstances of this case.

impair their ability to structure integral operations, is also satisfied in the instant case. As was held by the Supreme Court in *Hodel*:

> . . . because it (*National League*) further found that the challenged regulations would 'displace the States' freedom to structure integral operations in areas of traditional governmental functions,' the Court concluded that Congress could not, consistently with the Tenth Amendment, 'abrogate the States' otherwise plenary authority to make [these decisions].' (Citation omitted.) *Id.* at 2365.

Thus, the only question to which this Court must address itself is the remaining portion of the third requirement, i.e., whether the employees of the Transit Authority are engaged in a traditional governmental function when performing for it their duties as bus drivers.[6] This requirement was addressed by the Court in *United Transportation Union* v. *Long Island Railroad Co.*, 455 U.S. ____, 102 S.Ct. 1349, 71 L.Ed.2d 547 (1982). In *United Transportation Union*, the Court made it clear that its "emphasis on traditional state sovereignty was not meant to impose a static historical view of state functions generally immune from federal regulation." 102 S.Ct. at 1354. *United Transportation Union* went on to hold that there was no justification for a rule which would allow the States to acquire functions previously performed by the private sector (specifically, freight and commuter railroads) and thus erode federal authority in

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[6] This precise question has never been decided by this Court. *United Transportation Union* v. *Long Island Railroad*, 455 U.S. ____, 102 S.Ct. 349 (1982), upon which the Court of Appeals relied, addressed a similar but distinguishable (as discussed, *infra*) issue involving state operation of a railroad.

areas traditionally subject to federal statutory regulation.

Although the Court of Appeals recognized in its Opinion that *United Transportation Union* required more than a "static historical view," it nevertheless found that local mass public transportation was not a traditional governmental function based on what it termed "historical reality." This "historical reality" consisted primarily of the fact that state involvement has sharply increased since the *Urban Mass Transportation Act of 1964*, Pub. L. No. 88-365, 78 Stat. 302, 49 U.S.C. §§ 1601, et seq., (UMTA) made available federal assistance to State and local governments in financing mass transportation systems.

Petitioner submits that this "historical reality" analysis, while purporting to comply with *National League*, *Hodel*, and *United Transportation Union*, actually is in direct conflict with those decisions. The extent of this conflict may best be recognized by applying the same "historical reality" analysis to other areas which the Court has already enumerated as traditional functions.[7]

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[7] Not only are such considerations an inadequate measure of federal interest in this area, they are also totally without merit when viewed against the actual factual circumstances in the present case. The Transit Authority was established in 1958, well before UMTA. It thus became part of an expanding group of local public mass transit services. By 1960, 66.2 percent of residents of urban areas with a population of 500,000 or more were provided with local public mass transit; 48.1 percent of residents in urban areas with a population over 250,000 had such services. By fiscal 1964, the year before funds became available under UMTA, these figures had increased to 73.3 percent and 57.1 percent, respectively. (Population statistics are from U.S. Department of Commerce, *Statistical Abstract of the United States*, Table 9 at 10-12 and Table 10 at 13 [66th ed. 1945-46],

For example, federal funding of advanced waste treatment facilities began in 1956. The Senate Report on the *Clean Water Restoration Act of 1966*, Pub. L. No. 89-753, 80 Stat. 1246 (repealed 1970), refers to "the long period of disregard and neglect that preceeded Federal legislation in this field." S.Rep.No. 1367, 89th Cong., 2d Sess. reprinted in 1966 U.S. Code Cong. & Ad. News 3969, 3975. Similarly, solid waste management (sanitation), an activity specifically exempted in *National League*, was essentially the result of federal funding. According to *State Activities in Solid Waste Management*, 1974 (EPA, Office of Solid Waste Management Programs 1975), "[m]ost of the State programs in solid waste management originated only within the past decade, under the stimuli of Federal planning grants and technical assistance authorized by the *Solid Waste Disposal Act of 1965*." In another area, comprehensive, statewide health planning has been recognized as "spotty and fragmented" prior to federal funding of such planning. See H.R. Rep. No. 2271, 89th Cong. 2d Sess., reprinted in 1966 U.S. Code Cong. & Ad. News 3830, 3833 (Comprehensive Health Planning and Public Health Services Amendments of 1966, Pub. L. No. 89-789, 80 Stat. 1180 (1966).) *The*

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and from U.S. Department of Commerce, *Statistical Abstract of the United States*, Table 10 at 15 and Table 14 at 19-20 [86th ed. 1965] [published annually; hereafter cited as SAUS (19__)]. Cities served by public transit are from American Public Works Association. *History of Public Works in the United States, 1776-1976*, 177 (1976), J. Moody, *Moody's Transportation Manual*, a 70 (1960), J. Moody, *Moody's Transportation Manual*, a 72 (1961), J. Moody, *Moody's Transportation Manual*, a 78 (1962), and J. Moody, *Moody's Transportation Manual*, a 60 - a 61, (1964). Percentages for a given year are derived by adding the populations of the cities serviced by publicly owned transit systems, then dividing that sum by the total United States urbanized population of cities of the indicated size.)

National Health Planning and Resources Development Act of 1974, 42 U.S.C. §§ 300k *et seq.*, (1976), solidified federal dominance in the local and statewide health planning field. Finally, in the *Education for All Handicapped Children Act of 1975*, Pub. L. No. 94-142-89 Stat. 773, 775, Congress stated that "State and local education agencies have a responsibility to provide education for all handicapped children, but present financial resources are inadequate to meet the special education needs of handicapped children." The federal role is to be a "catalyst to local and state program growth." S.Rep. No. 94-168, 94th Cong. 1st Sess. reprinted in 1975 U.S. Code Cong. & Ad. News 1425, 1429.

Nor is it particularly significant that, as the Court of Appeals noted, mass transit was formerly controlled by the private sector. In *Brush* v. *Commissioner of Internal Revenue*, 300 U.S. 352 (1937), the Court noted:

> We conclude that the acquisition and distribution of a supply of water for the needs of the modern city involve the exercise of essential governmental functions . . .
>
> We find nothing that detracts from this view in the fact that in former times the business of furnishing water to urban communities, including New York, in fact was left largely, or even entirely, to private enterprise. The tendency for many years has been in the opposite direction, until now in nearly all the larger cities of the country the duty has been assumed by the municipal authorities. Governmental functions are not to be regarded as non-existent because they are held in abeyance, or because they lie dormant, for a time. If they be by their nature gov-

ernmental, they are nonetheless so because the use of them has had a recent beginning. (*Id.* at 370-71).[8]

Moreover, the fact that some private mass transit continues to exist is also not determinative of the issue. If the figures accepted by the Court of Appeals are used,[9] between 45 and 52 percent of all transit operations are privately owned. In 1979, 49 percent of all systems were privately owned.[10] At the same time, private schools accounted for 20 percent of elementary schools, 19.3 percent of secondary schools, and 56.5 percent of post-secondary schools.[11] Also in 1979, 58.3 percent of hospitals and 15.6 percent of beds were under state and local government ownership; and 5.2 percent of hospitals and 8.5 percent of beds were federally owned.[12]

It is apparent from the above comparisons that the factors relied upon by the Court of Appeals in arriving at its "historical reality" are not those upon which the Court

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[8] Although the decision on the narrow issue ruled upon in *Brush* (federal taxation of a local government official's salary) has since become invalid, the language in the above quotation remains as true as it was when written.

[9] These figures are misleading since they count each of the nation's 686 system as one unit, regardless of the system's size. Thus a system with one bus is equivalent to a system with over 2,000 buses. The principal provider of transit services in at least 100 of the largest 106 urbanized areas is publicly owned. U.S. Department of Transportation, *A Directory of Regularly Scheduled, Fixed Route, Local Public Transportation Service in Urbanized Areas Over 50,000 Population* (Aug. 1981). The percentages accepted by the Court of Appeals therefore tend to undervalue the actual effect of publicly owned transit systems.

[10] American Public Transit Association, *Transit Fact Book*, (1981).

[11] SAUS, Table 214 at 132 (1981).

[12] SAUS, Table 175 at 110 (1981).

has relied in deciding upon traditional governmental functions in *National League* and *Hodel*. Petitioner submits that this results from the misinterpretation of *United Transportation Union* by the Court of Appeals. Although the Court in *United Transportation Union* did examine the prior history of the railroads in an effort to determine the traditionalism of state involvement, that case involved an additional circumstance not found in the present case. Specifically, the Court in *United Transportation Union* examined the prior history of federal regulation of the railroads. That history, extending back for nearly a century, and consisting of federal regulation of nearly every conceivable facet of railroad operation clearly evidenced federal control of the area, well before the intervention of the States. In such a situation, the Court held, it would be inappropriate to allow the States to subsequently enter the field and disrupt that regulation.

However, in the area of localized mass transit, there is no corresponding history of regulation. The only legislation concerning this area to which the plaintiffs can point is UMTA, which exists not as a regulatory provision, but rather as a vehicle for distribution of funds to the States.[13] Had Congress intended to attach conditions to the distribution of these funds, it could have done so through the exercise of its spending power. In the absence of such

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[13] The fallacy of the Court of Appeals' position is made clear by *Jackson Transit Authority* v. *Local Division 1285 Amalgamated Transit Union*, 50 U.S.L.W. 4603 (June 7, 1982), where this Court specifically recognized that Section 13(c) of UMTA was not intended to create any federal law governing labor relations between state and local governments and their transit employees. Further, the Court went on to recognize the difference between provisions of UMTA and those of federal statutes applicable to railroad employees.

provisions, however, even those states and local governments which became involved in mass transit after the enactment of UMTA were not acquiring such systems knowing that they were subject to a long-standing and comprehensive scheme of regulation or with an awareness that public mass transit would be subject to the FLSA. See *United Transportation Union*, 102 S.Ct. at 1356. Indeed, until 1974 all operators, drivers and conductors of street electric railways and trolley and motorbus carriers were exempted from the overtime compensation provision of the FLSA, whether they were employed by public or private employers.[14]

Thus, unlike the situation in *United Transportation Union*, the present case does not involve states entering an otherwise private enterprise and then attempting to avoid pre-existing federal statutory regulation. Rather, the present case involves a formerly private enterprise which has gradually come to be recognized as an appropriate governmental function.[15] Only after the states had

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[14] Compare Pub.L. No. 89-601, § 206, 80 Stat. 830, 836 (1966) with Pub.L. No. 93-259, § 21(b), 88 Stat. 55, 68 (1974).

[15] This recognition is evident from the legislative histories of federal urban mass transit legislation, *Metropolitan Mass Transportation Legislation: Hearings Before Subcomm. No. 1 of the House Committee on Banking and Currency*, 86 Cong. 2d Sess. 14, 26 (1960). ("it is as necessary to provide transportation for these new communities as it is to provide other public necessities such as water, sewers, police and fire protection, and so forth" [statement of Rep. Addonizio]. . ." it is a vital public necessity that such service be provided, as necessary to economic life of the community as the provision of water, police and fire protection and other recognized public necessities" [statement of Rep. Corbett]; 120 Cong. Rec. 1042 (1974) ("mass transit is as much an essential public service as the fire department or hospitals" [statement of Sen. Biden]).

properly acknowledged their responsibility and begun to provide such service did the federal government attempt to impose any regulatory authority by requiring compliance with the FLSA provisions. The Petitioner respectfully submits that when viewed in this light, the "historical reality" of the present case is clearly distinguishable from *United Transportation Union* and that the decision of the Court of Appeals therefore is in conflict with *National League* and *Hodel*.

II. The Issue Involved Herein Is Of Nation-wide Importance And Of Far-reaching Effect, And Is Therefore Deserving Of Review By This Court.

The importance of this conflict and of the issue presented is evident from the magnitude of the matter involved, its effect on the public as a whole, and the controversy surrounding the issue as demonstrated by pending litigation throughout the country.

Perhaps the best measure of the magnitude of the issue involved is an examination of the operational statistics of public mass transit. As discussed above, even under the undervalued statistics accepted by the Court of Appeals, between 48 and 55 percent of all transit operations were publicly owned as of 1978. These publicly owned systems received 90 percent of the revenues from all transit operations; accounted for 91 percent of total vehicle miles operated and 91 percent of all linked passenger trips; and owned or leased 87 percent of total transit vehicles.[16] Clearly, any final decision which results in higher operating costs to public mass transit and which subsequently

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[16] Affidavit of Herbert J. Scheuer, Executive Director-Administration of American Public Transit Association, part of the record below.

results in a detriment to either its patrons (through increased costs and/or decreased service) or the public at large (through a required increase in government funding) will affect a large sector of our society).

Moreover, the importance of this issue is further demonstrated by the number of actions pending in various jurisdictions concerning identical situations. Decisions in such cases include: *San Antonio Metropolitan Transit Authority* v. *Donovan*, Civil Action No. SA 79 CA 457 (W.D. Texas 1981), vacated and remanded for further consideration in light of *United Transportation Union*, Docket Nos. 81-1728 and 81-1735 (U.S. June 7, 1982); *Dove* v. *Chattanooga Regional Transportation Authority*, Civil Action No. 1-80-249 (E.D. Tenn. 1981), appeal docketed, No. 81-5636 (6th Cir. Sept. 2, 1981); *Alewine* v. *City Council of Augusta, Georgia*, 505 F. Supp. 880 (S.D. Ga. 1981), appeal docketed, No. 81-7490 (11th Cir. June 5, 1981); *Francis* v. *City of Tallahassee*, No. 79-446 (2nd Cir. Fla. 1980); and *Joiner* v. *City of Macon*, Civil Act. No. 79-287 MAC (M.D. Ga. 1981), appeal docketed, No. 81-7789 (11th Cir. June 14, 1981). With the exception of *Joiner* v. *City of Macon*, each of these lower courts has held that provisions of the FLSA may not be constitutionally applied to public mass transit employees.[17]

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[17] The authority also notes that this issue has recently been addressed in *Scholz* v. *City of La Crosse*, No. 80-C-238 (W. D. Wisc. Sept. 1, 1982). The court in Scholz, while finding that local public transit is not a traditional governmental function, relied upon the findings and analysis of the Court of Appeals in the present case, which, has the Authority submitts above, was decided incorrectly.

III. The Decision Of The Court Of Appeals Conflicts With The Position Taken By The United States Court Of Appeals For The First Circuit.

On June 8, 1982, the United States Court of Appeals for the First Circuit decided *Molina-Estrada* v. *Puerto Rico Highway Authority*, ____ F.2d ____, 25 W. H. Cases 685 (No. 81-1447). In that case, the Court held that the fact that "the Authority arranges for the building of roads, sometimes builds roads itself, operates toll roads, keeps its roads in repair, and . . . operates some parking lots and *plans to build a mass transit system* . . . is sufficient to indicate that the Authority is responsible for 'traditional' or 'integral governmental activities'." *Id.* at 688. (Emphasis added.)

Moreover, the Court accepted the classification of "city transit" as a traditional governmental function indistinguishable for such purposes from the foregoing activities of the Authority. However, the First Circuit, unlike the Third Circuit, found little difficulty in distinguishing its present activities, as well as those planned, which included the construction of a mass transit system, and the several specific traditional governmental activities mentioned in *National League*, as well as "city transit," from the railroad operations in *United Transportation Union*. *Id.* at 688.

CONCLUSION

Transit Authority respectfully submits that the present case is appropriate for review by this Honorable Court because the decision of the United States Court of Appeals for the Third Circuit has decided an important question of federal law which has not been, but should be settled by this Court, and, in addition, has decided that question in a way that conflicts with applicable decisions

of this Court and with a decision of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 80-1008G

ROBERT M. KRAMER, *et al.*,

Plaintiffs,

v.

NEW CASTLE AREA TRANSIT AUTHORITY,

Defendant.

ORDER

AND NOW, this 11th day of JUNE, 1981, after considering the pleadings, the supporting affidavits, the motions filed, the briefs filed, and the arguments of counsel, this Court finds that there are not genuine issues of material fact; further, this Court finds that the integral operations of the New Castle Area Transit Authority are traditional governmental functions; further, this Court finds as a fact that Defendant provides an integral transportation service which is now and has been for some years a governmental function and which service has grown over the years into the status of a "traditional governmental function" due to economic and social changes in society caused by the geographically expanding suburbs and the need for reasonably cheap publicly subsidized transportation service which cannot be profitably supplied by the private sector at affordable prices. (See *Scheuer Affidavit*, paragraph 18); that because the Defendant now is engaged in a traditional governmental function, the minimum wage and overtime provisions of the Fair Labor Standards Act are not applicable to the Defendant's employees. (See *National League of Cities* v. *Usery*, 426 U.S. 833, 49 L.Ed.2d 245, 96 S.Ct. 2465 (1976) *Alewine* v. *City Council of Augusta Georgia*, 505 F. Supp 880 (1981)).

WHEREFORE, summary judgment is herein now entered for the Defendant and against the Plaintiff, and the action

brought by the Plaintiff in the above-captioned case is dismissed with prejudice.

/s/ Paul Simmons
PAUL SIMMONS
UNITED STATES DISTRICT JUDGE

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 81-2223

ROBERT M. KRAMER, LUTHER A. MILLER, DONALD PETTITT, HOWARD N. BARNES, DAVID R. SHAW, GERALD J. MAGGIE, ERNEST ORELLI, PHILLIPS C. REED, JAMES W. BURNS, G. MAXINE PARDICK, MARTHA E. KEITH, JAMES L. RAMSEY, CLYDE W. REED, RALPH L. JONES, PHILLIPS W. REED, JOHN P. CARSON, ROBERT C. BRUNSWICK, DAVID C. MATTHEWS, WALTER R. SLACK, WILLIAM L. HANNA, LOUIS V. PAGLIARO, and all other plaintiffs similarly situated,

Appellants

v.

NEW CASTLE AREA TRANSIT AUTHORITY

(D.C. Civil No. 80-1008)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: GIBBONS, WEIS and GARTH, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel on February 4, 1982.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered June 11, 1981, be, and the same is hereby reversed and the cause remanded for further proceedings not

inconsistent with the opinion of this Court. Costs taxed against appellee.

ATTEST:

/s/ M. Elizabeth Ferguson
ELIZABETH FERGUSON
Chief Deputy Clerk

April 30, 1982

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 81-2223

ROBERT M. KRAMER, LUTHER A. MILLER, DONALD PETTITT, HOWARD N. BARNES, DAVID R. SHAW, GERALD J. MAGGIE, ERNEST ORELLI, PHILLIPS C. REED, JAMES W. BURNS, G. MAXINE PARDICK, MARTHA E. KEITH, JAMES L. RAMSEY, CLYDE W. REED, RALPH L. JONES, PHILLIPS W. REED, JOHN P. CARSON, ROBERT C. BRUNSWICK, DAVID C. MATTHEWS, WALTER R. SLACK, WILLIAM L. HANNA, LOUIS V. PAGLIARO, and all other plaintiffs similarly situated,

Appellants

v.

NEW CASTLE AREA TRANSIT AUTHORITY
(D.C. Civil No. 80-1008)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued: February 4, 1982
Before: GIBBONS, WEIS AND GARTH, *Circuit Judges*
(Opinion Filed: April 30, 1982)

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OPINION OF THE COURT

GIBBONS, *Circuit Judge.*

Twenty-one plaintiffs, employed as bus operators by the New Castle Area Transit Authority (the Authority), appeal from the grant of summary judgment in favor of the defendant in their suit for overtime pay under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* (FLSA). The Authority is a political subdivision of the Commonwealth of Pennsylvania, and the district court dismissed the complaint in reliance on *National League of Cities* v. *Usery*, 426 U.S. 833 (1976). We reverse.

In *National League of Cities* v. *Usery*, the Court held that the tenth amendment prevented the application of the overtime pay provisions of FLSA to employees of states and their political subdivisions who were engaged in traditional governmental functions. *Id.* at 855. A nonexclusive list of such traditional functions included police protection, sanitation, public health, parks and recreation, hospitals, and schools. The *National League of Cities* case afforded little guidance, however, as to the identification of traditional functions. More recently we have been afforded clarification. In *Hodel* v. *Virginia Surface Mining & Reclamation Association, Inc.*, 452 U.S. 264, 287-88 (1981), the Court announced a three part test for evaluating whether a commerce clause regulation contravenes the tenth amendment:

> [I]n order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy *each* of three requirements. First, there must be a showing that the challenged regulation regulates the "States as States." Second, the federal regulation must address matters that are indisputably "attribute[s] of state sovereignty." And third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to struc-

ture integral operations in areas of traditional governmental function." (Citations omitted).

That test was reiterated in *United Transportation Union* v. *LIRR*, 50 U.S.L.W. 4315, 4317 (March 23, 1982). We assume, as did the district court, that the first two requirements of this conjunctive test are satisfied, and concentrate, as did the Court in *United Transportation Union*, on the third. In that case the Court emphasized that while "emphasis on traditional governmental functions and traditional state sovereignty was not meant to impose a static historical view of state functions generally immune from federal regulation," 50 U.S.L.W. at 4318, the historical reality of the activity in question could not be ignored. States are not free to assume functions historically performed by the private sector and thereby insulate those activities from federal regulation of interstate commerce.

Local mass transit systems have historically been owned and operated by private companies. Some public operation started in the early part of this century—Seattle (1911), San Francisco (1912), Detroit (1921), and New York (1932)—yet as late as 1960, 95% of transit companies in the nation were privately owned and operated. H.R. Rep. No. 204, 88th Cong., 2d Sess., *reprinted in*, [1964] U.S. Code Cong. & Ad. News, 2569, 2590. In 1964, Congress passed the Urban Mass Transportation Act of 1964, Pub. L. No. 88-365, 78 Stat. 302, *codified at* 49 U.S.C. §§ 1601, *et seq.*, (UMTA) in recognition of the difficulties being experienced by the private mass transit industry. The principal purpose of the Act was to "provide [federal] assistance to State and local governments and their instrumentalities in financing . . . [transportation] systems, to be operated by public or private mass transportation companies as determined by local needs." 49 U.S.C. § 1601(b)(3).

The UMTA put inexorable forces in motion whereby, at an accelerated pace, transportation companies changed hands from the private sector to the public sector. By 1978, local publicly owned transit systems received 90% of the revenues from all transit operations; accounted for 91% of total vehicle miles operated and 91% of all linked passenger trips; and

owned or leased 87% of total transit vehicles. (Scheuer Affidavit—App. 20a). Nonetheless, between 45 and 52% of all transit operations (counting each system, irrespective of size, as one unit) were privately owned. U.S. Dep't of Transportation, Urban Mass Transportation Administration, *A Directory of Regularly Scheduled, Fixed Route, Local Rural Public Transportation Service*, 6 (1980); U.S. Dep't of Transportation, Urban Mass Transportation Administration, *A Directory of Regularly Scheduled, Fixed Route, Local Public Transportation Service*, 17 (1979); Scheuer Affidavit (App. 20a). The federal government is actively involved in local mass transportation. It provides: (1) capital grants, funded on a "80% federal/20% local" matching basis; (2) operating grants, on a "50% federal/50% local" matching basis; and (3) technical assistance to state and local planning agencies on an "80% federal/20% local" matching basis.

We think that the state involvement in local transit systems, increasing with more systems coming under state control in recent years, does not alter the "historical reality" that the operation of mass transit systems "is not among the functions *traditionally* performed by state and local governments." *Cf. United Transportation Union* v. *LIRR*, 50 U.S.L.W. 4315, 4317 (March 23, 1982) (same conclusion reached with respect to commuter railroads). The whole move away from private transit systems and into public systems was started and effected by the federal government which provided the financial support to allow the changeover to public transportation companies. Moreover, the federal government has, through the matching funds programs, maintained an intimate involvement with the operation of such public systems. The result has been a network of publicly run systems which are cooperations between the federal government and the states. The tradition that has evolved encompasses not only state involvement in local mass transportation but also an important federal role in the matter. The Authority cannot recast this development as one in which the states took over transit services on their own while the federal government only provided *post hoc* financial assist-

ance. Massive state involvement with mass transit was *created* by the national government and the states are precluded from claiming, at this late date, that mass transit is a service which they traditionally provide. Tradition must be gauged in light of what actually happened, and what happened is a federal program of local transit service in which the states participate as late comer junior partners. There is, therefore, no tradition of the states *qua* states providing mass transportation.[1] Moreover, since it is undisputed that the national government can set the employment relations in the area of mass transit, it would be unjustified to allow the states, by acquiring functions previously performed by the private sector, to erode federal authority in this area. *See generally, United Transportation Union, supra,* 50 U.S.L.W. at 4318.

Judge Garth, concurring, prefers to rest his decision upon language in *United Transportation Union, supra,* to the effect that before federal regulatory legislation violates the tenth amendment it must have the effect of endangering a state's separate and independent existence, and hampering its ability to fulfill its role in the Union. While we do not disagree with his observation that such a federal regulatory scheme is almost inconceivable, and recognize that *National League of Cities* may in fact have been overruled, we prefer to decide this case on the narrower grounds discussed above, leaving to another

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[1] Defendant contends that, since private local transportation companies are doomed to extinction, state involvment is necessary and inescapable: that state provision of these services is the new "reality." We do not agree. Defendant's argument, as a logical construct, only goes to the determination of the "public vs. private" nature of local mass transit, it does not go to the "state vs. federal" nature of governmental involvement. What the defendant, at best, shows is that government must shoulder the burden abandoned by the private sector. This does not answer the federalism issue before us, i.e., whether local transportation services are traditional *state* functions immunized from federal regulation by the tenth amendment.

day consideration of the full reach of the *United Transportation Union* case.

The judgment appealed from is reversed and the case remanded to the district court for further proceedings not inconsistent with this opinion.

GARTH, J., concurring.

While unquestionably the history and operation of the New Castle Area Transit Authority differs from the history and operation of the Long Island Railroad, the Supreme Court's analysis in *United Transportation Union* v. *Long Island Railroad*, 50 U.S.L.W. 4315 (1982) clearly indicates that the Authority is subject to the provisions of the Fair Labor Standards Act. Even though the Authority, a state instrumentality, has operated the bus system which is the subject of this action since 1958, in terms of *Hodel* v. *Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 264 (1981) and *LIRR*, *supra*, it is apparent that the Authority is not providing a service which has "traditionally" been performed by state governments.

I prefer resting my decision in this case on the ultimate, and I think more definitive, test announced in *LIRR*. In my opinion, the crucial standard by which the Authority's immunity from FLSA must be measured is, do "the federal regulations affect basic state prerogatives in such a way as would be likely to hamper the state government's ability to fulfill its role in the union and endanger its 'separate and independent existence.'" 50 U.S.L.W. 4318.

Chief Justice Burger writing for the majority in *LIRR*, held that the application of the Railway Labor Act to New York's operation of the Long Island Rail Road, would not have the effect of endangering New York's "separate and independent existence" as a state. In so holding, it appears to me that the Supreme Court has now virtually restricted the rule of *National League of Cities*, 426 U.S. 833 (1976) to the particular and

peculiar facts of that case. I find it almost impossible to hypothesize very many other circumstances in which federal regulations would endanger the separate and independent existence of a state.[1] Thus, it seems to me that while different conclusions, each of which may be valid in its own right, might be reached as to whether a particular state function is a *"traditional"* function, there can be little dispute in my opinion, as to

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[1] In New York v. United States, 326 U.S. 572 (1945), the Supreme Court held that the State of New York could be taxed by the federal government on the sale of mineral waters taken from Saratoga Springs and therefore New York was not immune from taxation under § 615(a)(5) of the 1939 Internal Revenue Act which imposed a tax on mineral waters.

Chief Justice Stone in his concurring opinion stated:

> But in view of our former decisions we could hardly say that a general non-discriminatory real estate tax (apportioned), or an income tax laid upon citizens and States alike could be constitutionally applied to the State's capital, its State-house, its public school houses, public parks, or its revenues from taxes or school lands, even though all real property and all income of the citizen is taxed.
>
> * * *
>
> Only when and because the subject of taxation is State property or a State activity must we consider whether such a non-discriminatory tax unduly interferes with the performance of the State's functions of government. If it does, then the fact that the tax is non-discriminatory does not save it.

The Chief Justice qualified his opinion by quoting from Metcalf & Eddy v. Mitchell, 269 U.S. 514, 523-24:

> But neither government may destroy the other nor curtail in any substantial manner the exercise of its powers. Hence the limitation upon the taxing power of each, so far as it affects the other, must receive a practical construction which permits both to function with the minimum of interference each with the other; and that limitation cannot be so varied or extended as seriously to to impair either the taxing power of the government imposing the tax . . . or the appropriate exercise of the functions of the government affected by it. Metcalf & Eddy v. Mitchell, supra, 523-24.

whether a state's very existence will be endangered by a particular federal Statute or Regulation. In effect therefore, the "endangering" test announced by the Court, whatever its wisdom, appears to me to have the undeniable virtue of being more certain in application than the "traditional function" test. By being more certain in application, it will undoubtedly have the effect of forestalling disputes of the type presented by the instant case.

Having been instructed that subjecting the Long Island Rail Road to the Railway Labor Act would not threaten the "separate and independent existence" of New York as a state, I can hardly maintain otherwise with respect to the application of the FLSA to the operation of the New Castle Area Transit Authority. Thus, tested by the standard of "endangering a state's separate and independent existence," I agree with Judge Gibbons that the order of the district court granting summary judgment for the Authority, must be reversed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 81-2223

ROBERT M. KRAMER, *et al.*,

Appellants,

v.

NEW CASTLE AREA TRANSIT AUTHORITY

Appellee.

(D.C. Civil No. 80-1008)

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges*

The petition for rehearing filed by

Appellee

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ John Gibbons
JOHN GIBBONS
Judge

Dated: May 25, 1982

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

Section 3(d) of the FLSA, 29 U.S.C. 203(d):

'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

Section 3(x) of the FLSA, 29 U.S.C. 293(x):

'Public Agency' means the Government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Rate Commission), a State, or a political subdivision of a State; or any interstate governmental agency.

29 C.F.R. 775.3(b)

For the purpose of the notice referred to in § 775.2(b), the Administrator has determined that the following functions of a State or its political subdivisions are not traditional. From time to time, this section will be amended to list other such functions determined not to be traditional. The date listed after each function is the date of original publication in the FEDERAL REGISTER. This is the effective date of the general notification described in § 775.2(b). However, where an employing body has actual notice on an earlier date of the position taken by the Administrator, that earlier date is the effective date of the specific notification described in § 775.2(b).

(1) Alcoholic beverage stores December 21, 1979.

(2) Off-track betting corporations December 21, 1979.

(3) Local mass transit systems December 21, 1979.

(4) Generation and distribution of electric power December 21, 1979.

(5) Provision of residential and commercial telephone and telegraphic communication December 21, 1979.

(6) Production and sale of organic fertilizer as a by-product of sewage processing December 21, 1979.

(7) Production, cultivation, growing or harvesting of agricultural commodities for sale to consumers December 21, 1979.

(8) Repair and maintenance of boats and marine engines for the general public December 21, 1979.

No. 82-701

Office - Supreme Court, U.S.
FILED
DEC 20 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NEW CASTLE AREA TRANSIT AUTHORITY,

Petitioner,

v.

ROBERT M. KRAMER, LUTHER A. MILLER, DONALD PETTITT, HOWARD N. BARNES, DAVID R. SHAW, GERALD J. MAGGIE, ERNEST ORELLI, PHILLIPS C. REED, JAMES W. BURNS, G. MAXINE PARDICK, MARTHA E. KEITH, JAMES L. RAMSEY, CLYDE W. REED, RALPH L. JONES, PHILLIPS W. REED, JOHN P. CARSON, ROBERT C. BRUNSWICK, DAVID C. MATTHEWS, WALTER R. SLACK, WILLIAM L. HANNA, LOUIS V. PAGLIARO, and all other plaintiffs similarly situated,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

The urban mass transit industry has historically been dominated by the private sector and subject to federal commerce power legislation; recently, under the impetus of large scale federal funding, local transit authorities have entered the field. Under these circumstances, did the United States Court of Appeals err in concluding that, in light of *United Transportation Union* v. *Long Island Railroad*, 455 U.S. ——, 102 S. Ct. 1349, 71 L. Ed. 2d 547 (1982), the doctrine of intergovernmental immunity, recognized in *National League of Cities* v. *Usery*, 426 U.S. 832 (1976), does not bar the application of the Fair Labor Standards Act to the employees of a local public transit authority.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NEW CASTLE AREA TRANSIT AUTHORITY,

Petitioner,

v.

ROBERT M. KRAMER, LUTHER A. MILLER, DONALD PETTITT, HOWARD N. BARNES, DAVID R. SHAW, GERALD J. MAGGIE, ERNEST ORELLI, PHILLIPS C. REED, JAMES W. BURNS, G. MAXINE PARDICK, MARTHA E. KEITH, JAMES L. RAMSEY, CLYDE W. REED, RALPH L. JONES, PHILLIPS W. REED, JOHN P. CARSON, ROBERT C. BRUNSWICK, DAVID C. MATTHEWS, WALTER R. SLACK, WILLIAM L. HANNA, LOUIS V. PAGLIARO, and all other plaintiffs similarly situated,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Constitutional Provisions and Statutes Involved.

The pertinent portions of the U.S. Constitution, the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 *et seq.* (1976 & Supp. IV 1980), and the Urban Mass Transportation Act of 1964, 49 U.S.C. § 1601 *et seq.* (1976 & Supp. IV 1980), are set forth in the Appendix at pp. B1-B7.

Statement of the Case.

The Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, as amended, requires employers covered by the Act, including transit companies engaged in commerce, whether public or private, to pay their employees a minimum hourly wage and to pay them at no less than one and one-half times their regular rate of pay for hours worked in excess of 40 during a work week. See 29 U.S.C. § 206 (a)(1) and 207(a)(1). In *National League of Cities* v. *Usery*, 426 U.S. 833 (1976) (hereinafter "*NLC*"), this Court recognized a constitutional doctrine of intergovernmental immunity that restricts Congress' otherwise plenary power to legislate respecting commerce in a fashion that would "operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions." *Id.* at 852. On that basis, this Court ruled that the FLSA's minimum wage and maximum hour protection could not be applied to such functions.

In response to the *NLC* ruling, on December 21, 1979, the Secretary of Labor amended the statement of FLSA enforcement policy to provide a listing of governmental activities outside the scope of the states' tenth amendment immunity from application of the FLSA. On that list, the Secretary placed mass transit systems in the category of government activities *not* integral to a traditional government function and hence subject to the FLSA. 44 Fed. Reg. 75630 (1979) (codified at 29 C.F.R. 775.3(b)(3)).

Petitioner, New Castle Transit Authority, is a publicly owned transit authority which, since 1958, has provided transit service in the area of New Castle, Pennsylvania. Like other transit authorities, since 1965, New Castle has received substantial federal financial assistance under the Urban Mass Transportation Act ("UMTA"), 49 U.S.C. § 1601 *et seq.* (1976 & Supp. IV 1980).

After the Secretary of Labor announced his classification of transit as a function not exempted from the FLSA, see p. 2, *supra*, Respondents, 21 bus drivers employed by Petitioner, filed an action in the United States District Court for the Western District of Pennsylvania for overtime pay due them under the Act. On June 11, 1981, the district court rendered judgment for the petitioner, reasoning that, under *NLC*, the public takeover in New Castle barred respondent's claim (Pet. App. at 19). The employees appealed.

Relying on this Court's elaboration of the *NLC* rationale in *Hodel* v. *Virginia Surface Mining & Recl. Ass'n.*, 452 U.S. 264 (1981) (hereinafter "*Hodel*"), and *United Transportation Union* v. *Long Island Railroad*, 455 U.S. ——, 102 S. Ct. 1349 (1982) (hereinafter "*Transportation Union*"), issued after the district court's decision, the court of appeals reversed the judgment of the district court.

ARGUMENT

A. The decision of the court of appeals carefully applies the teaching of this Court in *NLC*, *Hodel* and *Transportation Union*, to the situation of a particular industry—mass transit. The decision below is correct; it plainly does not conflict with any decision of this Court, nor does it conflict with a decision of any court of appeals.

The court of appeals noted that local mass transit systems had been historically owned and operated by private companies,[1] and that:

> . . . The whole move away from private transit systems and into public systems was started and effected by the federal government which provided the financial support to allow the changeover to public transportation companies. Moreover, the federal government has, through the matching funds program, maintained an intimate involvement with the operation of such public systems. The result has been a network of publicly run systems which are cooperations between the federal government and the states. . . .

(Petitioner's Appendix at 9a) (hereinafter "Pet. App."). That court concluded:

> . . . Massive state involvement with mass transit was *created* by the national government and the states are precluded from claiming, at this late date, that mass transit is a service which they traditionally provide. Tradition must be gauged in light of which actually happened, and what happened is a federal program of local transit service in which the states participate as late comer junior partners. There is, therefore, no tradition of the states *qua* states providing mass transportation. Moreover, since it is undisputed that the national government can set the employment relations in the area of mass transit, it would be unjustified to allow the states, by acquiring functions previously performed by the private sector, to erode

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1. In 1960, 95% of transit systems were privately owned and operated. H.R. Rep. No. 204, 88th Cong., 1st Sess. 22 (1963), *reprinted in*, 1964 U.S. Code Cong. & Ad. News, 2569, 2590. Not until 1967 were even half of all transit riders patronizing publicly owned systems. American Public Transit Authority, Transit Fact Book, 1981, page 27.

> federal authority in this area. *See generally, United Transportation Union, supra,* 50 U.S.L.W. at 4318.

(*Id.* at 10a).

Judge Garth, concurring, added that, although he agreed with the principal opinion's conclusion that petitioner was not performing a traditional local governmental function and was for that reason not entitled to immunity from the application of the FLSA, he would also conclude that New Castle's compliance with the FLSA would not, in any event, "endanger" the "separate and independent existence" of the state and, accordingly, under *Transportation Union,* was not exempt from the FLSA for that independent reason. (*Id.,* at 11a, citing *Transportation Union, supra*).

These rulings faithfully apply the *NLC* rule as explained and refined in *Hodel* and *Transportation Union.* As this Court stated in the latter decision:

> "*[I]n order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of National League of Cities must satisfy each of three requirements.* First, there must be a showing that the challenged regulation regulates the 'States as States.' *Id.,* [426 U.S.] at 854. Second, the federal regulation must address matters that are indisputably 'attributes of state sovereignty.' *Id.,* at 845. And third, it must be apparent that the States' compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional functions.' *Id.,* at 852."

In *Transportation Union,* this Court went on to stress:

> [t]he *key prong* of the *National League of Cities* test . . . is the *third one,* which examines *whether "the States' compliance with federal law would directly impair their ability' to structure integral operations in areas of traditional functions.'* "

455 U.S. at ——, 102 S. Ct. at 1353, quoting *NLC,* 426 U.S. at 852 (emphasis added).

> This "prong," said the Court, require[s] an inquiry into whether the federal regulation affects basic State prerogatives in such a way as would be likely to *hamper the state government's ability to fulfill its role in the Union* and *endanger its "separate and independent existence."* [*NLC, supra*], 426 U.S. at 851.

Looking specifically at a recently acquired local public commuter railroad, this Court concluded that the tenth amendment does not require "a rule which would allow the states, by acquiring functions previously performed by the private sector, to erode federal authority in areas traditionally subject to federal statutory regulation." *Id.* at 1355.

The court of appeals correctly recognized that even the reading of *Transportation Union* most favorable to Petitioner forecloses acceptance of Petitioner's claim that it, or mass transit generally, is immune from federal commerce power legislation. First, no principled distinction between the services performed by the Long Island Railroad and those performed by Petitioner or other mass transit operations is possible. As the Court recognized in *Transportation Union*, the operations of the Long Island Railroad primarily involve the transportation of commuter passengers within particular urban areas to and from work, school, and stores. *Transportation Union, supra*, 455 U.S. at ——, n. 1, 102 S. Ct. at 1351, n. 1.

Second, the history of the Long Island Railroad is indistinguishable from the history of the rest of mass transit. After years of private ownership, the Long Island Railroad was acquired by an agency of the state of New York in 1966, following passage of the federal UMTA. Similarly, the public takeover of mass transit systems,

95% of which were in private hands in 1961, also occurred in the years following the passage of the federal act.

Third, like the Long Island Railroad, the rest of transit was subject to overall federal regulation when in the private sphere.[2]

Finally, in the overwhelming majority of cases in transit generally, the actual acquisition by the public authority of the system from private owners was financed by a federal UMTA grant. Federal capital assistance was the cause of general public involvement (cf. Pet. Br., at 10-11). After providing the wherewithall for local public bodies

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2. From its enactment in 1935, the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* (1976 & Supp. IV (1980)), has applied to private transit on terms equally with other industries "affecting commerce." *Amalgamated Assn. of Street, Electric & Motor Coach Employees* v. *Wisconsin Employment Relations Board*, 340 U.S. 383, 391-92, n. 13 (1951) (holding that the NLRA preempted a Wisconsin law prohibiting strikes by private transit employees).

Since 1961, the FLSA, the Act at issue here, has also applied to the private transit industry. When, in 1966, Congress became aware that federal UMTA funds were fueling the public takeover of mass transit in many cities, Congress extended FLSA coverage to include publicly owned transit, thus ensuring that, as a statutory matter, public takeovers did not oust the federal regulatory scheme that the FLSA imposed on private transit labor relations. FLSA Amendments of 1966, § 102.

Other subsequently enacted national labor legislation applied to the private transit industry; *i.e.*, Labor Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (1959) (codified at 29 U.S.C. § 40 *et seq.* (1976 & Supp. IV 1980)) (reporting requirements); the Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified at 29 U.S.C. § 206(d) (1976 & Supp. IV 1980)) (requiring equal pay for women for equal work); Title vii of the Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701-16, 78 Stat. 241, 253-66 (codified at 42 U.S.C. § 2000e (1976 & Supp. IV 1980)) (prohibiting employment discrimination on the basis of race, sex, creed, or national origin).

to involve themselves in the provision of transit services, the federal government continued to underwrite the undertaking on a scale distinct from the federal assistance in any other area.[3]

B. Petitioner's difference with the appeals court opinion rests largely on Petitioner's disagreement with that court's understanding of the factual history of mass transit. (1) Petitioner contends that, in determining whether transit had a long history of private provision, the court of appeals should have confined its review to transit in cities of over 250,000 population or 500,000 population in 1964 (Pet. Br., at 9). Petitioner nowhere sets forth why this should be the measure; in 1964, only 16% of the entire American population lived in such large communities. (2) Petitioner also proposes, again without explanation, that, for the "history" of transit, this Court should look at the year *1979*, well after the federal commerce clause legislation applied to the undertaking and after federal funding had enabled the states and localities to enter the industry (Pet. Br., at 12). Petitioner's proposed contemporaneous analysis would load the scales inevitably toward a finding of immunity and is simply contrary to this Court's approach in *Transportation Union*.

C. Petitioner correctly points out that a number of other cases involving whether the states may immunize mass transit from federal regulation are pending in various courts. (Pet. Br., at 16). See, *Dove* v. *Chattanooga Area*

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3. Federal operating assistance is available for 80% of the cost of transit capital projects, 49 U.S.C. § 1603(a), and 50% of transit operating deficits, 49 U.S.C. § 1604(e), while, for example, localities receive federal assistance for only 8.8% of the cost of education and 12% of public safety. National Center for Education Statistics, Digest of Education Statistics, (1976); U.S. Census Bureau, Governmental Finances (1977-78).

Regional Transportation Authority, Civ-1-80-249 (E.D. Tenn. July 21, 1981), appeal pending, No. 81-5636 (6th Cir.) (argued 11/4/82); *Joiner* v. *Macon*, No. 79-287-MAC (M.D. Ga. Apr. 27, 1981), appeal pending, No. 81-7789 (11th Cir.) (argued 11/2/82); *Alewine* v. *Augusta*, 505 F. Supp. 880, 884 (M.D. Ga. 1982) appeal pending, No. 81-7490 (11th Cir.) (argued 11/2/82); *Francis* v. *Tallahassee*, No. 79-446 (2nd Cir. Fla. 1980); *San Antonio Metropolitan Transit Authority* v. *Donovan*, 457 U.S. ——, 102 S. Ct. 2897 (1982), pending after remand, No. SA 79 CA 457 (W.D. Tex.); *Scholz* v. *LaCrosse*, No. 80 C 238 (W.D. Wisc. Sept. 1, 1982). In the only other opinion issued since *Transportation Union*, a district court also ruled that the state could not take transit from the private sphere and thereby immunize it from federal law. *See Scholz* v. *LaCrosse*, *supra*. (A copy of the decision of the district court in *Scholz* v. *LaCrosse* is attached hereto as App. p. A1).

As these cases reflect, of the several hundred transit providers in the United States, only a handful do not already pay their employees for the disputed overtime work. Moreover, the few courts to consider the matter thus far agree that *Transportation Union* dictates the outcome the court of appeals reached here.[4] Should a conflict develop

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4. Attempting to create the appearance of a conflict, Petitioner proffers the recent decision of the United States Court of Appeals for the First Circuit in *Molina-Estrada* v. *Puerto Rico Highway Authority*, 650 F. 2d 841 (1st Cir. 1982), denying the FLSA claims of Puerto Rican highway workers (Pet. Br., at 17). *Molina-Estrada* was actually decided on the statutory ground that the FLSA applies equally to Puerto Rico and the states. However, addressing the underlying constitutional question of whether the states would have been immune in operations such as the Puerto Rico Highway Authority, the court noted that road building had

(Footnote continued on next page)

out of the cases already cited, there will be time enough for this Court to review the matter and to provide additional guidance to the lower courts.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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(Footnote continued from preceding page)
been a public function "from time immemorial," (*Id.* 650 F. 2d at 845) refused to consider any other function performed or planned by the authority, because "the appellants are not [doing the other jobs"] (*id.* at 846), and explained that "the parties here are apparently willing to have us apply" a standard for activities *always in the public sphere.* (*id.* at 845). On the question presented here, the court of appeals did cite with approval its own earlier decision refusing to apply intergovernmental immunity to an important community service—telephone communications—which had recently been transferred into the public sphere. *See Puerto Rican Telephone Co.* v. *F.C.C.*, 553 F. 2d 694 (1st Cir. 1977), cited *Id.* at 844.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JOHN J. SCHOLZ, VIRGIL HALDORSON, LeROY MEYERS, KENNETH BYE, JOHN SMABY, LEO KRUSCHEK, CARL SCHROEDER, LINDA MILLER, EUGENE BYERSON, WILLIAM BERG, GERALD DAHLKE, DONALD DENNY, THOMAS DeVRIES, ROGER FRY, EUGENE HALL, TERRY HICKS, THOMAS HILL, MILO HOETH, GREGORY JOHNSON, STEVEN KNUTSON, CONRAD NOHR, RUSSELL PAGE, STEVEN PHAFF, GARY PICHA, WILLIAM RUDY, THOMAS SANDERSON, JOHN STEELE, ROYCE VON LANKEN, ROBERT WOOD, CHARLES HUTH, GIL DEGENHARDT,

Plaintiffs,

v.

CITY OF LA CROSSE, a municipal corporation; RON BRACEGIRDLE, as President of the Municipal Transit Utility, City of La Crosse, his successors, agents and assigns and all those acting in concert therewith; JEROME RUSCH, as Director of Personnel, City of La Crosse, his successors, agents, assigns, and all those acting in concert therewith; and WESLEY M. DENNY, as City Treasurer, City of La Crosse, his successors, agents, assigns, and all those acting in concert therewith,

Defendants.

MEMORANDUM AND ORDER

80-C-238

Before this Court in this matter are cross motions for summary judgment. The Court reserves judgment as to

damages and other relief, but otherwise grants plaintiffs' motion and denies defendants' motion.

This action was brought pursuant to the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201 to 219. Jurisdiction is asserted, uncontroverted, and appears to be correctly based, on 28 U.S.C. § 1337 and 29 U.S.C. § 216(b).

The following facts necessary to the decision reached by the Court are undisputed:

FACTS

Plaintiffs are now, or have been during the past three years, bus operators employed by the City of La Crosse and the La Crosse Municipal Transit Utility.

Defendants are the City of La Crosse, a municipal corporation organized under Wisconsin law, and various individuals employed by the City of La Crosse to manage its Municipal Transit Utility which is an agency of the city government. Hereinafter, the defendants will be referred to as "the city."

The city purchased the La Crosse Transit Company, a privately owned mass transit system, on or about January 1, 1975, and thereafter formed the La Crosse Municipal Transit Utility (LMTU). The purchase was, at least in part, funded by a grant of federal money made available under the Urban Mass Transportation Act. The city had, for approximately four years prior to the purchase, subsidized the private operation of the transit system.

Prior to the purchase of the transit system by the city, the bus operators of the system were covered under FLSA and received, in accordance with FLSA provisions, overtime compensation for hours worked in excess of a predetermined work week. Since the purchase by the city, the

bus operators have not received time and one-half for overtime although the latest contract bargained between the city and the bus operators (represented by the Amalgamated Transit Union, AFL-CIO, Local 519) does provide for overtime pay for hours worked in a week in excess of forty-four hours. During the past three years, FLSA required time and one-half for overtime for covered employees. The LMTU is not a suable entity. The transit system is a city owned and operated utility and its bus operators are city employees. Compensation is fixed by the common council of the city after collective bargaining.

The transit system operates exclusively within the city. In the recent past, some bus routes ran into the Town of Shelby, an area adjacent to La Crosse and, like the city, entirely within the State of Wisconsin. No interstate transportation is provided by the system.

In addition to the funds received from the federal government for the purchase of the system, the city receives federal funds for operations and capital equipment.

The system provides transportation services to the people of the City of La Crosse, a city of approximately 50,000 persons. Ridership statistics show an average of 3,700 fares paid daily. A privately operated taxicab company operates within the city. The predominant mode of transportation in the city is the private automobile.

MEMORANDUM

The issue presented in this section is whether bus operators employed by a city, driving routes entirely within the city and its adjacent areas but not in interstate commerce, are covered employees under the overtime compensation requirements of FLSA. Plaintiff bus operators assert that they are; the city maintains that they are not,

and that any requirement to the contrary would contravene the Tenth Amendment reservation of powers to the states.

Both parties recognize that *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), and the cases which followed it are controlling here. The test which states and municipalities must pass in order to legitimately assert Tenth Amendment was enunciated in *Hodel* v. *Virginia Surface Mining & Reclamation Assoc.*, 452 U.S. 264, 287-88 (1981);

> [I]n order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy each of three requirements. First, there must be a showing that the challenged regulation regulates the "States as States." Second, the federal regulation must address matters that are undisputably "attributes of state sovereignty," and third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional governmental function."

There has been little argument concerning the first two of these requirements. The Court concludes that they have been met and recognizes that they would be anytime that the wages and working conditons of state or municipal employees are regulated by the federal government.

The question, therefore, relates to whether providing mass transportation to city residents by a municipal government is a "traditional governmental function." While the Court believes that an analysis in this regard to be an exercise in the useless splitting of hairs, it is nonetheless required under *National League of Cities*. The status of the bus operators as city employees should be the end of the inquiry, but it is not.

It appears to the Court that there are three ways to undertake such analysis. First, the Court could demand extensive evidence concerning the historical record of municipal operation of transit systems nationwide. The record in this case is devoid of such information. However, other Courts which have faced the particiular issue have undertaken such an inquiry and the results are available. See *Kramer* v. *New Castle Area Transit Authority*, 677 F. 2d 308, 309 (3rd Cir. 1982), where the Court found that various large cities began to operate transit systems as early as 1911, but that the practice did not become widespread until relatively recently. The availability of federal money to purchase or subsidize transit systems precipitated this movement in the 1960's.

Under such an analysis, the city's argument would fall. As the *Kramer* court decided, a practice which did not gain widespread acceptance until less than twenty years ago, and which is not, even today, the predominant method of providing a service, cannot be considered a "traditonal function of government."

Second, the Court could consider the evidence provided concerning the municpal operation itself from an historical viewpoint. This would be the least satisfying approach to the question. But, again, the city's argument cannot prevail. The city has operated the system for something more than seven years, hardly long enough to establish the practice as a tradition.

Third, and probably the most productive analysis, is by analogy to the functions which have been found to be traditional (and, of course, to those which have been held to be not traditional). Defendants' attempts to find provision of transit services comparable to city operation of schools,

hospitals, parks and garbage collection are totally unconvincing. Although none of these services were consistently provided everywhere in the 19th century, they frequently were. And municipal operation of such services probably existed in some places prior to the adoption of the Constitution.

Much more helpful are two court decisions which face exactly the issue in this case: Whether mass transit is a traditional governmental function so that imposition of FLSA overtime provisions can be applied to municipal employees of such systems. In *Kramer*, supra, the Court specifically held that operation of a transit system was not a traditional government function:

> We think that the state involvement in local transit systems, increasing with more systems coming under state control in recent years, does not alter the "historical reality" that the operation of mass transit systems "is not among the functions *traditionally* performed by state and local governments." (emphasis in original)

677 F. 2d at 310. On the other hand, the Court in *San Antonio Metro Transit Authority* v. *Donovan*, 25 W&H 271 (W.D. Tex. 1981), concluded precisely the opposite. However, this decision was vacated and remanded by the Supreme Court, at 102 S. Ct. 2897 (1982) for reconsideration in light of *United Transportation Union* v. *Long Island Railroad*, —— U.S. ——, 102 S. Ct. 1349 (1982). While *Long Island* provides substantive argument for both sides, this Court is compelled to conclude that providing transportation is not a traditional governmental function.

In *Long Island*, Chief Justice Burger, speaking for a unanimous Court, stated:

> Operation of passenger railroads, no less than operation of freight railroads, has traditionally been a function of private industry, not state or local governments. It is certainly true that some passenger railroads have come under state control in recent years, as have several freight lines, but that does not alter the historical reality that the operation of railroads is not among the functions *traditionally* performed by state and local governments. (Emphasis in original.)

102 S. Ct. at 1354. It seems inescapable that, by replacing the term "passenger railroads" above with "mass transit," the statement above would remain true. The Chief Justice did justify the opinion in *Long Island* by extensive reference to the interstate commerce aspects of the railroad in question. However, such references in no way lessen the force which he believed the meaning of "traditional" to be:

> Just as the Federal Government cannot usurp traditional state functions, there is no justification for a rule which would allow the States, *by acquiring functions previously performed by the private sector,* to erode federal authority in areas traditionally subject to federal statutory regulation. (Emphasis added.)

Id. at 1355. The city has acquired a function "previously performed by the private sector." The area "traditionally subject to federal statutory regulation" here is wages and hours under the Fair Labor Standards Act. The import of the *Long Island* decision is that a state or municipality cannot subvert the federal policy by purchasing the private business. Although the city may very well not have intended this when it purchased the transit system in 1975, it is precisely the effect which has occurred.

CONCLUSION

From the foregoing, the Court determines that the plaintiff bus operators are covered employees under the Fair Labor Standards Act.

Accordingly,

ORDER

IT IS ORDERED that defendants' motion for summary judgment is DENIED.

IT IS FURTHER ORDERED that plaintiffs' motion for summary judgment is GRANTED as to liability, and in other respects DENIED.

Entered this 1st day of September, 1982.

BY THE COURT:

JOHN C. SHABAZ,
District Judge.

APPENDIX B

1. The Constitution of the United States provides in pertinent part:

Article I, Section 8:

> The Congress shall have Power
>
> • • •
>
> To regulate Commerce • • • among the several States • • •;
>
> • • •
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Article VI, cl. 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof • • • shall be the supreme Law of the Land • • •.

Tenth Amendment:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

2. The Fair Labor Standards Act, 29 U.S.C. 201 *et seq.* (1976 & Supp. IV 1980) provides in pertinent part:

29 U.S.C. 202:

> (a) The Congress finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels

and instrumentalities of commerce to be used to spread and perpetrate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce. That Congress further finds that the employment of persons in domestic service in households affects commerce.

(b) It is declared to be the policy of this chapter, through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without susbtantially curtailing employment or earning power.

29 U.S.C. 203. As used in this chapter:

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

* * *

(r) "Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose. * * * For purposes of this subsection, the activities performed by any person or persons—

* * *

(2) in connection with the operation of a street, suburban or interurban electric railway, or local trolley or motorbus carrier, if the rates and services of

such railway or carrier are subject to regulation by a State or local agency (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), or

(3) in connection with the activities of a public agency,

shall be deemed to be activities performed for a business purpose.

• • •

(s) "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise which has employees engaged in commerce or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person, and which—

• • •

(5) is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit); or

(6) is an activity of a public agency.

• • •

The employees of an enterprise which is a public agency shall for purposes of this subsection be deemed to be employees engaged in commerce, or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce.

29 U.S.C. 206(a):

> Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:
>
> (1) not less than $2.65 an hour during the year beginning January 1, 1978, not less than $2.90 an hour during the year beginning January 1, 1979, not less than $3.10 an hour during the year beginning January 1, 1980, and not less than $3.35 an hour after December 31, 1980, except as otherwise provided in this section;

29 U.S.C. 207(a):

> (1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

3. The Urban Mass Transportation Act of 1964, 49 U.S.C. 1601 *et seq.* (1976 & Supp. IV 1980) provides in pertinent part:

49 U.S.C. 1601:

(a) The Congress finds—

> (1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas, which generally cross the boundary lines of local jurisdictions and often extend into two or more States;
>
> (2) that the welfare and vitality of urban areas, the satisfactory movement of people and goods within

such areas, and the effectiveness of housing, urban renewal, highway, and other federally aided programs are being jeopardized by the deterioration or inadequate provision of urban transportation facilities and services, the intensification of traffic congestion, and the lack of coordinated transportation and other development planning on a comprehensive and continuing basis; and

(3) that Federal financial assistance for the development of efficient and coordinated mass transportation systems is essential to the solution of these urban problems.

(b) The purposes of this chapter are—

(1) to assist in the development of improved mass transportation facilities, equipment, techniques, and methods, with the cooperation of mass transportation companies both public and private.

(2) to encourage the planning and establishment of areawide urban mass transportation systems needed for economical and desirable urban development, with the cooperation of mass transportation companies both public and private; and

(3) to provide assistance to State and local governments and their instrumentalities in financing such systems, to be operated by public or private mass transportation companies as determined by local needs.

49 U.S.C. § 1601(a):

The Congress finds that the rapid urbanization and the continued dispersal of population and activities within urban areas has made the ability of all citizens to move quickly and at a reasonable cost an urgent national problem; that it is imperative, if efficient, safe, and convenient transportation compatible with soundly planned urban areas is to be achieved, to continue and expand this chapter; and that success will require a Federal commitment for the expendi-

ture of at least $10,000,000,000 over a twelve-year period to permit confident and continuing local planning, and greater flexibility in program administration. It is the purpose of this Act to create a partnership which permits the local community, through Federal financial assistance, to exercise the initiative necessary to satisfy its urban mass transportation requirements

59 U.S.C. § 1602(e):

No financial assistance shall be provided under this chapter to any State or local public body or agency thereof for the purpose, directly or indirectly, of acquiring any interest in, or purchasing any facilities or other property of, a private mass transportation company, or for the purpose of constructing, improving, or reconstructing any facilities or other property acquired (after July 9, 1964) from any such company, or for the purpose of providing by contract or otherwise for the operation of mass transportation facilities or equipment in competition with, or supplementary to, the service provided by an existing mass transportation company, unless (1) the Secretary finds that such assistance is essential to the program of projects required by section 1607 of this title, (2) the Secretary finds that such program, to the maximum extent feasible, provides for the participation of private mass transportation companies, (3) just and adequate compensation will be paid to such companies for acquisition of their franchises or property to the extent required by applicable State or local laws, and (4) the Secretary of Labor certifies that such assistance complies with the requirements of section 1609(c) of this title.

49 U.S.C. 1603(a):

• • • The Federal grant for any such project to be assisted under Section 1602 of this title shall be in an amount equal to 80 per centum of the net project cost. • • •

49 U.S.C. 1604(e):

> The Federal grant for any construction project under this section shall not exceed 80 per centum of the cost of the construction project, as determined under section 1603(a) of this title. The Federal grant for any project for the payment of subsidies for operating expenses shall not exceed 50 per centum of the cost of such operating expense project. * * *

49 U.S.C. (Supp. IV) § 1609(c):

> (c) It shall be a condition of any assistance under section 1602 of this title that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance. Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise; (2) the continuation of collective bargaining rights; (3) the protection of individual employees against a worsening of their positions with respect to their employment; (4) assurances of employment to employees of acquired mass transportation systems and priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(2) of this title. The contract for the granting of any such assistance shall specify the terms and conditions of the protective arrangements.

No. 82-701

Supreme Court, U.S.
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ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NEW CASTLE AREA TRANSIT AUTHORITY,

Petitioner,

v.

ROBERT M. KRAMER, LUTHER A. MILLER, DONALD PETTITT, HOWARD N. BARNES, DAVID R. SHAW, GERALD J. MAGGIE, ERNEST ORELLI, PHILLIPS C. REED, JAMES W. BURNS, G. MAXINE PARDICK, MARTHA E. KEITH, JAMES L. RAMSEY, CLYDE W. REED, RALPH L. JONES, PHILLIPS W. REED, JOHN P. CARSON, ROBERT C. BRUNSWICK, DAVID C. MATTHEWS, WALTER R. SLACK, WILLIAM L. HANNA, LOUIS V. PAGLIARO, and all other plaintiffs similiarly situated,

Respondents.

RESPONDENTS' SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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ARGUMENT

Respondents Robert M. Kramer, et al., file this Supplemental Brief to call this Court's attention to the recent decision of the First District Court of Appeals for the State of Florida in *Francis* v. *City of Tallahassee*, —— So. 2d —— (1st Fla. Dist. Ct. App. Dec. 10, 1982), holding that bus drivers employed by the City of Tallahassee mass transit bus system are covered by the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* (hereinafter, "FLSA"). The ruling of the Court of Appeals is set forth in the Appendix at pp. A1-A5. In so holding, the Florida Court of Appeals reversed the ruling of the trial court, cited as authority by Petitioner. *Francis* v. *City of Tallahassee*, No. 79-446 (2nd Cir. Fla. 1980) (Pet. Br., at 16).

Applying the tests set forth by this Court in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), *Hodel* v. *Virginia Surface Mining & Reclamation Association, Inc.*, 452 U.S. 264 (1981), and *United Transportation Union* v. *Long Island Railroad*, 455 U.S. ——, 102 S. Ct. 1349, 71 L. Ed. 2d 547 (1982) (hereinafter, "*Transportation Union*"), the Florida Court of Appeals, citing *Kramer* v. *New Castle Area Transit Authority*, 677 F. 2d 308 (3rd Cir. 1982), unanimously rejected the City of Tallahassee's argument that the Tenth Amendment to the United States Constitution barred application of the FLSA to its municipal transit employees, holding instead that "local mass transit systems are within the purview of the FLSA." (App. A4)[1].

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1. In its ruling, the Court of Appeals explicitly rejected the City's argument, made by Petitioner here as well (Pet. Br., at 13, n. 13), that this Court's ruling in *Jackson Transit Authority* v. *Local Division 1285, Amalgamated Transit Union*, 457 U.S. ——, 102 S. Ct. 2202, 72 L. Ed. 2d 639 (1982) supports the City's position. (App., p. A5).

The Florida Court of Appeals decision is the second appellate court and third judicial ruling on the merits of this issue since this Court's decision in *Transportation Union, supra,* each of which has held the Tenth Amendment not to be a bar to application of the FLSA to publicly-owned mass transit systems. *Kramer* v. *New Castle Area Transit Authority, supra; Scholz* v. *LaCrosse,* No. 80-C-238 (W.D. Wisc. Sept. 1, 1982). *See,* Resp. Br., at 9. In view of the unanimity of the post-*Transportation Union* decisions on the question presented to this Court and in the absence of any conflict among United States Courts of Appeals, the petition for writ of certiorari should be denied.

Respectfully submitted,

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IN THE DISTRICT COURT OF APPEALS
FIRST DISTRICT, STATE OF FLORIDA

WILLIAM FRANCIS, individually and on behalf of all others similarly situated, *Appellant*, vs. CITY OF TALLAHASSEE, *Appellee*.	Not Final Until Time Expires to File Rehearing Petition and Disposition Thereof if Filed. — Case No. AJ-104

Opinion filed December 10, 1982

An Appeal from the Circuit Court for Leon County. Charles A. Miner, Jr., Judge.

James O. Shelfer, of Gardner, Shelfer, Mendelson and Duggar, Tallahassee, for Appellant.

Bryan W. Henry, City Attorney and James R. English and Lewis E. Shelley, Assistant City Attorneys, of Henry, Buchanan, Mick & English, P.A., Tallahassee, for Appellee.

McCORD, J.

William Francis, individually and on behalf of all others similarly situated, appeals from the trial court's final summary judgment determining that bus drivers employed by the City of Tallahassee mass transit system (Taltran) are not covered by the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* (FLSA). We reverse.

The relevant facts to this appeal are essentially undisputed. The plaintiffs seek damages from the City of Tallahassee and a ruling from the trial court to the effect that Taltran is subject to the minimum wage and maximum

hour provisions of the FLSA. Specifically, they seek overtime pay for hours worked in excess of 40 hours per week.

Prior to December 3, 1973, the local Tallahassee bus service was owned and operated by a private company, City Transit, Inc. At that time, its drivers had a right to overtime pay under the FLSA, as the City concedes. On that date, however, with the assistance of federal monies provided under the Urban Mass Transit Act (UMTA), 49 U.S.C. § 1601 *et seq.*, Tallahassee purchased the bus service. After purchasing the system Tallahassee retained the same drivers, and the function and duties of the system's personnel remained about the same. The federal government continues to subsidize Taltran to the extent of paying approximately 50% of the system's operating losses. The actual fare charged returns less than one-half of the actual cost of the operation. Further, for budgetary, personnel, and employee relations purposes, Taltran is treated much the same as other municipal departments, and its employees are subject to the same rules and regulations as other city employees. The trial court granted its final summary judgment in reliance upon *National League of Cities* v. *Usery* (*NLC*), 426 U.S. 833, 49 L. Ed. 2d 245, 96 S. Ct. 2465, (1976) and *Amersbach* v. *City of Cleveland*, 598 F. 2d 1033 (6th Cir. 1979).

In *NLC*, the U.S. Supreme Court held that the 10th Amendment prevented the application of the overtime pay provisions of the FLSA to employees of states or their political subdivisions who are engaged in traditional government functions. *Id.* at 855, 49 L. Ed. 2d at 259-60, 96 S. Ct. at 2475. A nonexclusive list of such traditional functions included police protection, sanitation, public health, parks and recreation, hospitals, and schools. *NLC*, however, afforded little guidance as to the identification of such traditional governmental functions. Later, in *Ho-*

del v. *Virginia Surface Mining & Reclamation Association, Inc.*, 452 U.S. 264, 101 S. Ct. 2352, 69 L. Ed. 2d 1 (1981), the court announced a three-pronged test for evaluating whether a commerce clause regulation, such as the FLSA, contravenes the 10th Amendment:

> [I]n order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy each of three requirements. First, there must be a showing that the challenged regulation regulates the "State as States." Second, the federal regulations must address matters that are indisputably "attribute[s] of state sovereignty." And third, it must be apparent that the State's compliance with the federal law would impair their ability "to structure integral operations in areas of traditonal governmental functions." (Citations omitted).

Id. at 287-8, 69 L. Ed. 2d at 23, 101 S. Ct. at 2365-6. The key prong to this test is the third one. *United Transportation Union* v. *Long Island Railroad Company* (*LIRR*), 455 U.S. ——, ——, 71 L. Ed. 2d 547, 553, 102 S. Ct. 1349 (1982). While noting that the determination of whether a federal law impairs a state's authority with respect to "areas of traditional functions" is difficult, the U.S. Supreme Court has observed:

> In essence, *National League of Cities* held that under most circumstances federal power to regulate commerce could not be exercised in such a manner as to undermine the role of the States in our federal system. This Court's emphasis on traditional governmental functions and traditional aspects of state sovereignty was not meant to impose a static historical view of state functions generally immune from federal regulation. Rather, *it was meant to require an inquiry into whether the federal regulation affects basic State prerogatives in such a way as would be likely to ham-*

> *per the state government's ability to fulfill its role in the Union and endanger its "separate and independent existence."*
>
> Just as the federal government cannot usurp traditional state functions, *there is no justification for a rule which would allow the State, by acquiring functions previously performed by the private sector, to erode federal authority in areas traditionally subject to federal statutory regulations.* (Citations omitted; emphasis supplied).

LIRR, 455 U.S. at ——, 71 L. Ed. 2d at 554-5. Applying these tests, the Third Circuit Court of Appeals has concluded, and we agree, that the local mass transit systems are within the purview of the FLSA. *Kramer* v. *Newcastle Area Transit Authority,* 677 F. 2d 308 (3d Cir. 1982). That court noted that local mass transit systems have been historically owned and operated by private companies; that the federal government, through the UMTA, has demonstrated an active involvement in local mass transportation; and, that the move away from private transit systems into public transit systems was started and effected by the federal government which provided the financial support, through the UMTA, to allow the change-over. Further, it retains through its matching funds program an intimate involvement in such public systems. *Id.* at 309-10. Considering the pervasive influence of the federal government in this area, as well as Tallahassee's relatively recent entry into the field, one could hardly conclude that local mass transit is a "traditional function." Additionally, we find it difficult to understand how the imposition of overtime wages on the City of Tallahassee for these particular employees will impair or endanger the separate and independent existence of a state or its political subdivisions. *LIRR,* 455 U.S. at ——, 71 L. Ed. 2d at 554-5; *Kramer,* at 311 (Garth, concurring).

We find nothing in *Amersbach* v. *City of Cleveland*, 598 F. 2d 1033 (6th Cir. 1979), which dictates a different conclusion. In *Amersbach*, the Sixth Circuit Court of Appeals determined that the operation of a municipal airport was an integral function of city government and thus immune from the minimum wage and maximum hour provisions of the FLSA. As that court observed, however, privately owned airports serving municipalities are virtually unknown, unlike mass transit systems which, for the most part, were until recently private entities. *Id.*, at 1038. Further, the City's reliance on *Jackson Transit Authority* v. *Amalgamated Transit Union, Local 1285*, —— U.S. ——, 72 L. Ed. 2d 639, 102 S. Ct. —— (1982) is misplaced, for there the issue was whether section 13(c) of the UMTA by itself permits a union to sue in federal court for violation of collective bargaining agreements. It contains no mention at all of the FLSA, and we decline to extend its rationale to this case.

The trial court relied upon the decision and opinion of the United States Circuit Court of Appeals, Second Circuit, in *United Transportation Union* v. *Long Island Railroad Co.*, 634 F. 2d 19 (2d Cir. 1980), which was reversed by the United States Supreme Court subsequent to the trial court's disposition of this case [*United Transportation Union* v. *Long Island Railroad Company*, 455 U.S. ——, 71 L. Ed 2d 547, 102 S. Ct. 1349 (1982)]. It should also be noted that the trial court had no opportunity to consider the Third Circuit's opinion in *Kramer* v. *Newcastle Area Transit Authority, supra*, as it was released after the trial court's disposition of this case.

Accordingly, for the reasons set forth above, this cause is reversed and remanded to the trial court for further proceedings consistent with this opinion.

BOOTH and WENTWORTH, JJ., CONCUR.